Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-98
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

The National Railroad Passenger Corporation ("Amtrak"), by its attorneys and pursuant to Section 1.429 of the Federal Communications Commission's Rules,[1/] respectfully submits these comments in support of the Petition for Clarification of the Association of American Railroads (the "AAR").[2/] The AAR has asked the Commission to clarify and partially to reconsider Paragraph 994 of the First Report and Order ("Interconnection Order") in the above-captioned proceeding.[3/]

1/ 47 C.F.R. § 1.429 (1995).

2/ See Public Notice, 61 Fed. Reg. 53,922 (1996).

3/ First Report and Order, FCC 96-325, CC Docket Nos. 96-98, 95-185 (Aug. 8, 1996), 61 Fed. Reg. 45,476 (1996), partial stay granted, Iowa Util. Bd. v. FCC, 1996 U.S. App. LEXIS 27953 (8th Cir. Oct. 15, 1996), petition for reversal of stay pending (U.S. Sup. Ct., filed Oct. 24, 1996).

Amtrak does not believe that Paragraph 994 of the Interconnection Order is ambiguous in its discussion of "telecommunications carrier," or that the Commission's discussion in this paragraph was in any way intended to affect the long-standing distinction between private and common carriers. Amtrak nonetheless supports the AAR's request that the Commission remove any doubt or confusion with respect to this distinction that might have arisen from the language used by the Commission in the Interconnection Order.

For nearly 15 years, Amtrak has leased to a major communications carrier right-of-way and related Amtrak property along rail lines in the mid-Atlantic and New England regions, over which the carrier has installed fiber optic cables and other telecommunications facilities. The carrier (which operates as a common carrier) uses most of the fiber capacity for its own services, but -- pursuant to its lease agreement with Amtrak -- makes certain capacity in these cables and facilities available to Amtrak. Amtrak uses a substantial portion of this capacity for its own communications needs, and sells or leases the excess capacity to third parties. In these transactions with third parties, Amtrak applies its own criteria in selecting customers with which to deal, and offers telecommunications services to each customer based on individualized, separately negotiated terms, conditions and rates.

Amtrak's offering of service to these third parties is clearly on a private carrier basis. Well-established law holds that a telecommunications provider making individualized decisions in particular cases, regarding whether and on what terms to

serve customers, is not a common carrier for purposes of the Communications Act.[4/] The Commission has long recognized this distinction between common and private carriers,[5/] and has refrained from regulating as common carriage the sale or lease of fiber capacity on an individualized basis.[6/]

The distinction between common and private carriers was expressly retained in the Telecommunications Act of 1996 (the "1996 Act"), which provides that "[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."[7/] The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[8/] Congress stated in the Joint Explanatory Statement of the Committee of Conference that this definition is intended

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4/ See e.g., Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("[w]hether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance"); National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (NARUC II) ("The primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently. . . . [A] carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve."). See also National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.) (NARUC I), cert. denied, 425 U.S. 992 (1976).

5/ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 431 (1980).

6/ See, e.g., Lightnet, 58 Rad. Reg.2d (P&F) 182 (1985); Norlight, 2 F.C.C.R. 132, on recon., 2 F.C.C.R. 5167 (1987).

7/ 47 U.S.C.A. § 153(44) (1996).

8/ Id. § 153(46).

to refer to "services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings . . . and private services."[9/]

Amtrak does not interpret the Interconnection Order to alter this definition. Nor could the FCC in one paragraph, without giving the public notice and an opportunity to comment, alter the long-standing distinction between private and common carriers previously recognized by the courts, the Commission itself, and the 1996 Act. Consequently, Amtrak believes that the two quotations cited by the AAR in paragraph 994 as unclear must be read to be consistent with this long-standing distinction.

Unlike the AAR, Amtrak interprets Paragraph 994's reference to "selling excess capacity in private fiber or wireless networks" as merely an unambiguous example of a type of telecommunication offering that, if provided to the public indifferently, would subject the provider to common carrier regulation. Indeed, Paragraph 994 specifies that only where an entity is "[p]roviding to the public [this type of] telecommunications" will the entity be subject to common carrier regulation.[10/]

Similarly, the phrase, "or to such classes of users as to be effectively available directly to the public," as used in 1996 Act and repeated by the Commission in the Interconnection Order, should not be read to encompass private carrier sales to common carriers. The quoted phrase is merely a reference to the notion expressed in NARUC II that carrying for all people indifferently "does not mean that the particular

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9/ H.R. REP. NO. 104-458, at 115 (1996).

10/ Interconnection Order ¶ 994 (emphasis added).

service offered must practically be available to the entire public," because "a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users."[11/] Thus, unless a carrier indiscriminately offers service "directly" to the public or to all potential users, it cannot be considered a common carrier.[12/] Nothing in the Interconnection Order can be read to modify this long-accepted distinction between private and common carriage, or to create a special category for the sale of fiber capacity.

CONCLUSION

For the foregoing reasons, Amtrak supports the goal of the AAR's petition, and respectfully requests the Commission to clarify that (1) nothing in the Interconnection Order was meant to change, in any way, the long-standing distinction between common and private carriers, as recognized by the Commission, acknowledged by the courts, and expressly retained by Congress in the 1996 Act, and

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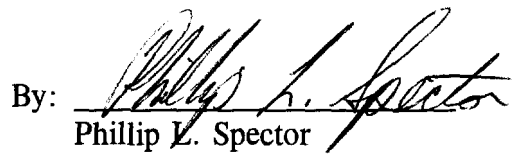
11/ NARUC II, 533 F.2d at 608.

12/ See Lightnet, 58 Rad. Reg.2d at 185-86 (finding that an entity selling fiber capacity on an individualized basis to companies which in turn provided communications services to the public, was not itself providing service to the public, and was therefore providing a non-common carrier service).

(2) the sale of excess fiber capacity on an individualized, private-contract basis constitutes a private carrier service.

Respectfully submitted,

THE NATIONAL RAILROAD
PASSENGER CORPORATION

By: 

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of The National Railroad Passenger Corporation (Amtrak) was served this 31st day of October, 1996, by first-class mail on the following:

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